SRI LANKA CRICKET

v.

WORLD SPORT NIMBUS PTE LTD

COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
HASHIM YUSOFF JCA
AZMEL MAAMOR JCA
[CIVIL APPEAL NO. W-04-964-2004]
14 MARCH 2006

ARBITRATION: *Award - Enforcement - Foreign award - Arbitration conducted and award made in Singapore - No Gazette Notification declaring Singapore a party to New York Convention - Whether award could be enforced in Malaysia - Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 1985, ss. 2(2), 3(1)*

STATUTORY INTERPRETATION: *Construction of statutes - Interpretation - Section 2(2) Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 1985 - Whether mandatory or directory - Whether evidential in nature - Purposive approach*

The award in the present case related to a dispute that was commercial in nature. More importantly, there was no Gazette Notification as mentioned in s. 2(2) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 1985 ('the Act'), which had been enacted by Parliament to give effect to the New York Convention ('the Convention'). The issue here was whether that prevented the enforcement of the award made in the present instance. This was a case in which the arbitration was conducted, and the award made, in Singapore. The plaintiff/respondent sought to enforce the award in Malaysia, and although the defendant/appellant resisted, the judge held for the plaintiff. Hence, the present appeal. The defendant submitted that the judge lacked jurisdiction to permit enforcement since there was no Gazette Notification declaring that Singapore was a party to the Convention. In the absence of such a notification, no question of enforcement arose. The plaintiff, however, put forward three contentions on the way in which s. 2(2) of the Act was to be interpreted: (i) the section was merely permissive or directory and not mandatory, because it used the expression "may" in the phrase "The Yang di-Pertuan Agong may, by order in the Gazette, declare …", and therefore it did not matter that there was no

A Gazette Notification; (ii) s. 2(2) of the Act was merely evidential in nature; and (iii) the Act should be read purposively so as to promote the intention of Parliament to permit the enforcement of foreign arbitral awards in a summary fashion.

B **Held (allowing the appeal)**
Per Gopal Sri Ram JCA:

(1) The word "may" when read in the context of s. 2 and indeed the whole Act means "must". If His Majesty (in effect the Federal Cabinet by virtue of art. 40(1) of the Federal Constitution) wishes to extend the benefit of the summary method of enforcement provided for by s. 3(1) of the Act to a particular award, then it is logical that he must by Gazette Notification declare the country in which that award was made to be a party to the Convention. If His Majesty elects not to do so, then that benefit is not available to the party seeking enforcement. In the present case, if the Act was not there, the plaintiff would have had to sue on the award in an action at common law, or it would have to register the award in the Singapore court and then seek to register and enforce that judgment under the Reciprocal Enforcement of Judgments Act 1958 ('the REJA'). The right to enforce a Convention award pursuant to s. 3(1) of the Act was, therefore, a benefit that the plaintiff would not, but for the Act, have. Hence, the requirement of gazetting a country as a party to the Convention must have been intended by Parliament to be mandatory in effect. (paras 7, 8, 9 & 10)

(2) Once it is determined that s. 2(2) of the Act is mandatory in nature, the argument that it is evidential falls to the ground. What s. 2(2) does is to require His Majesty to gazette a country as a party to the Convention and once that is done, no further proof of that fact is necessary. All that one has to do is to produce the Gazette and thereafter no evidence shall be admitted to contradict the contents of the Gazette. That is the effect of the conclusive evidence limb of s. 2(2) of the Act. (para 11)

(3) While the modern approach to interpretation of written law is to examine the purpose of the particular statute, this is of no assistance to the plaintiff. The purpose of the Act is to give effect to the Convention subject to certain reservations. One of the steps that Parliament intended that the Executive

should take to give the Act efficacy was to issue a Gazette Notification declaring one or more countries as a party or as parties to the Convention, which was the intention that was being given effect to now. It may be that the Executive has not acted for all these years on grounds of comity and reciprocity, or perhaps it is an oversight. For although Malaysia has not issued a Gazette Notification pursuant to s. 2(2) of the Act, Singapore had in 1985 included Malaysia in its Gazette as a Convention party. (para 12)

(4) The plaintiff's submissions were, therefore, devoid of any merit and were contrary to common sense. The plaintiff, however, would not be left remediless. There was nothing to prevent the plaintiff from having the award registered as a judgment in the Singapore High Court and then to seek registration of that judgment in this country pursuant to the REJA. (paras 7 & 13)

Bahasa Malaysia *translation of headnotes*

Award dalam kes semasa adalah berkaitan satu pertikaian yang bersifat komersial. Lebih penting, tiada sebarang Pemberitahuan Gazet seperti yang disebut di dalam s. 2(2) Akta Konvensyen Mengenai Pengiktirafan dan Penguatkuasaan Award Timbangtara Asing 1985 ('Akta'), yang digubal Parlimen bagi memberi kesan kepada Konvensyen New York ('Konvensyen'). Isu yang berbangkit adalah sama ada ketiadaan gazet tersebut telah menghalang pelaksanaan award yang dibuat di sini. Ini adalah kes di mana timbangtara dan award telah dijalan dan diberikan di Singapura. Plaintif/responden berhasrat untuk menguatkuasakan award di Malaysia, dan walaupun ia ditentang oleh defendan/perayu, ia telah dibenarkan oleh hakim. Akibatnya adalah rayuan semasa. Defendan berhujah bahawa hakim tidak berbidangkuasa untuk membenarkan penguatkuasaan, oleh kerana tiada Pemberitahuan Gazet yang mengisytiharkan bahawa Singapura adalah pihak kepada Konvensyen. Dalam ketiadaan pemberitahuan sedemikian, soalan mengenai penguatkuasaan dikatakan tidak berbangkit. Apapun, plaintif mengemukakan tiga hujah mengenai pentafsiran s. 2(2) Akta, iaitu: (i) sekyen tersebut hanya bersifat membenar atau direktori dan bukan mandatori, kerana ia menggunakan ekspresi "boleh" di dalam ungkapan "Yang di-Pertuan Agong boleh, melalui perintah di dalam Gazet, mengisytiharkan …" dan kerana itu adalah tidak penting sama ada Gazet wujud ataupun tidak; (ii) s. 2(2) Akta adalah bersifat 'evidential'; dan (iii)

A Akta harus dibaca secara 'purposive' bagi menonjolkan niat Parlimen untuk membenar penguatkuasaan award timbangtara asing melalui prosedur ringkas.

Diputuskan (membenarkan rayuan)
B **Oleh Gopal Sri Ram HMR:**

(1) Perkataan "boleh" dibaca dalam konteks s. 2(2) dan malah keseluruhan Akta adalah bermaksud "hendaklah". Sekiranya Baginda (secara berkesannya Kabinet Persekutuan mengambil kira fasal 40(1) Perlembagaan Persekutuan) berhasrat untuk C memanjangkan manfaat kaedah pelaksanaan ringkas seperti yang diperuntukkan oleh s. 3(1) Akta kepada sesuatu award tertentu, maka secara logiknya beliau hendaklah mengisytiharkan, melalui Pemberitahuan Gazet, negara di mana award tersebut dibuat sebagai pihak kepada konvensyen. Jika Baginda memilih D untuk tidak berbuat demikian, maka manfaat sedemikian tidak terbuka kepada pihak yang memohon penguatkuasaan. Dalam kes semasa, sekiranya Akta tidak wujud, plaintif terpaksa mendakwa award dalam satu guaman di sisi common law, ataupun mendaftarkan award di mahkamah Singapura dan E selepas itu memohon untuk mendaftar dan menguatkuasakan penghakiman di bawah Akta Penguatkuasa Salingan Hukuman 1958 ('APSH'). Oleh itu, hak untuk menguatkuasa suatu award Konvensyen di bawah s. 3(1) Akta adalah suatu manfaat yang plaintif tidak mungkin perolehi kecuali dengan F adanya Akta. Ianya menurut bahawa, kehendak menggazetkan sesebuah negara sebagai pihak kepada konvensyen adalah diniat oleh Parlimen sebagai satu kehendak mandatori.

(2) Hujah bahawa s. 2(2) bersifat 'evidential' gugur dengan G sendirinya sebaik seksyen tersebut diputuskan bersifat mandatori. Kesan s. 2(2) adalah bahawa ia mengkehendaki Yang di-Pertuan Agong supaya mengazetkan sesebuah negara sebagai pihak kepada Konvensyen, dan sebaik ianya dibuat, tiada bukti lain diperlukan bagi membuktikan fakta tersebut. H Seseorang hanya perlu mengemukakan gazet yang berkenaan, selepas mana tiada keterangan boleh diterima-masuk bagi menyangkal kandungan gazet itu. Inilah kesan sebenar cabang keterangan muktamad s. 2(2) Akta.

I **(3)** Sementara pendekatan moden pentafsiran undang-undang bertulis adalah untuk memeriksa tujuan sesuatu statut, ia bagaimanapun tidak membantu plaintif. Tujuan Akta adalah

untuk memberi kesan kepada konvensyen, tertakluk kepada beberapa syarat tertentu. Salah satu langkah yang dianggap oleh Parlimen sebagai harus diambil oleh Eksekutif bagi mempasti kelancaran Akta adalah dengan mengeluarkan Pemberitahuan Gazet mengisytiharkan sebuah atau beberapa negara sebagai pihak atau pihak-pihak kepada konvensyen, dan inilah tujuan telah diberi kesan oleh mahkamah ini. Mungkin selama ini pihak Eksekutif tidak bertindak kerana didesak perasaan untuk hormat menghormati, atau disebabkan oleh kekhilafan. Natijahnya adalah, walaupun Malaysia tidak mengeluarkan sebarang Pemberitahuan Gazet berdasarkan s. 2(2) Akta, Singapura telah berbuat demikian pada tahun 1985 dengan menamakan Malaysia sebagai pihak kepada Konvensyen.

(4) Hujah plaintif dengan itu adalah tidak bermerit dan bertentangan dengan akal budi. Plaintif, bagaimanapun, bukanlah tidak mempunyai remedi langsung. Tiada suatupun yang boleh menghalang plaintif dari mendaftarkan award sebagai suatu penghakiman di Mahkamah Tinggi Singapura dan kemudian memohon untuk mendaftarkan penghakiman tersebut di negara ini di bawah APSH.

Case(s) referred to:

Kali Pada Chowdhury v. Union of India AIR [1963] SC 134 ***(refd)***

Kuwait Minister of Public Works v. Sir Frederick Snow [1984] 1 AC 426 ***(refd)***

Pepper v. Hart [1993] 1 All ER 42 ***(refd)***

Re Warren [1870] 4 SALR 25 ***(refd)***

Teh Cheng Poh v. PP [1979] 1 MLJ 50 ***(refd)***

Legislation referred to:

Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 1985, ss. 2(2), 3(1)

Federal Constitution, art. 40(1)

Interpretation Acts 1948 and 1967, s. 17A

For the appellant - CV Das (Shamsul Manap & Lam Ko Luen with him); M/s Shook Lin & Bok

For the respondent - Tommy Thomas (Rueben Mathiavaranam & John Skelchy with him); M/s Zaid Ibrahim & Co

[Appeal from High Court, Kuala Lumpur; Originating Summons No: R2-24-33-2004]

Reported by Suresh Nathan

JUDGMENT

Gopal Sri Ram JCA:

[1] Twenty-one years ago Parliament enacted the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 1985 ("the Act"). It was to give effect to what has come to be known as the New York Convention and which came into being in 1958. It was adopted by Malaysia but with some reservations which you will find written into the Act. Section 2 of the Act is important. In its first subsection it defines certain terms. One of these has immediate relevance to this appeal. It is the definition of "Convention award" which is as follows:

> 'Convention award' means an award on differences between persons arising out of a defined legal relationship, whether contractual or not, considered as commercial under the law in force in Malaysia made:
>
> (a) in pursuance of an arbitration agreement to which the New York Convention applies; and
>
> (b) in pursuance of an arbitration agreement in the territory of a State other than Malaysia, which is a party to the New York Convention.

[2] Section 2(2) provides as follows:

> The Yang di-Pertuan Agong may, by order in the Gazette, declare that any State specified in the order is a party to the New York Convention, and that order shall, while in force, be conclusive evidence that that State is a party to the said Convention.

[3] The next provision relevant to the present case is s. 3(1) of the Act which reads:

> 3(1) A Convention award shall, subject to the following provisions of this Act, be enforceable in Malaysia either by action or in the same manner as the award of an arbitration is enforceable by virtue of section 27 of the Arbitration Act 1952.

[4] It is common ground that the award in the present case relates to a dispute that is commercial in nature. More importantly, it is common ground that there is no Gazette Notification as mentioned in s. 2(2). The issue here is whether that prevents the enforcement of the award made in the present instance. Now, this is a case in which the arbitration was conducted, and the award

made, in Singapore. The plaintiff (respondent before us) sought to enforce that award in Malaysia. The defendant (appellant before us) resisted. The judge held for the plaintiff. Hence this appeal.

[5] At the outset of his argument learned counsel for the defendant submitted that the learned judge lacked jurisdiction to permit enforcement as there was no Gazette Notification declaring that Singapore is a party to the Convention. In the absence of such a Notification no question of enforcement arises. In support of his argument learned counsel referred us to *Kuwait Minister of Public Works v. Sir Frederick Snow* [1984] 1 AC 426 where Lord Brandon in his speech, after referring to the in *pari materia* provision in the parallel UK statute said this:

> My Lords, while I am content to decide the question raised by this appeal solely on what I consider to be the correct meaning of the expression 'Convention award' as defined in s. 7(1) of the 1975 Act, it appears to me that that construction gains added support from the terms of s 7(2), which I also set out in full at an earlier stage. That subsection contemplates that the normal way in which a party, who seeks to enforce a foreign arbitral award under the 1975 Act, will prove that the state in which the award was made is a party to the convention is by producing an Order in Council of the kind there authorised. *It is clear from the wording of s. 7(2) that the only matter which an Order in Council made under it can declare is that one or more foreign states specified in the order are, as at the date of the order, a party to the convention.* If the phrase 'which is a party to the New York Convention', as used in the definition of the expression 'Convention award' contained in s. 7(1) of the 1975 Act, were to be construed in the way contended for by the appellants, one would expect that s. 7(2) would authorise Orders in Council which not only declared that one or more foreign states were parties to the convention, but also stated the dates on which they became such parties. (emphasis added.)

[6] From the general speech made by Mr Thomas of counsel for the plaintiff we were able to discern three submissions on the way in which, he says, s. 2(2) is to be interpreted. First, the section is merely permissive or directory and not mandatory, because it uses the expression "may" in the phrase "The Yang di-Pertuan Agong may, by order in the Gazette, declare …" Therefore it does not matter that there is no Gazette Notification. His second submission is that s. 2(2) is merely evidential in nature. In other words, once there is a Gazette Notification then that Notification may be produced as conclusive evidence that the country concerned is a party to the Convention. Since it is merely a

question of proof, it is open to his client to produce any other acceptable evidence to prove that the country in which the award was made is a party to the Convention. This method of proof includes producing secondary evidence through publications available on the internet. His third and more general submission is that the Act should be read purposively so as to promote the intention of Parliament to permit the enforcement of foreign arbitral awards in a summary fashion.

[7] With respect, these submissions of Mr Thomas are devoid of any merit and are contrary to common sense. In the first place, the word "may" when read in the context of s. 2 and indeed the whole Act means "must". If His Majesty (in effect the Federal Cabinet by virtue of art. 40(1) of the Federal Constitution, see *Teh Cheng Poh v. Public Prosecutor* [1979] 1 MLJ 50) wishes to extend the benefit of the summary method of enforcement provided for by section 3(1) to a particular award then it is logical that he must by Gazette Notification declare the country in which that award was made to be a party to the Convention. If His Majesty elects not to do so, then that benefit is not available to the party seeking enforcement.

[8] That the context in which a word appears is of primary importance was emphasised in *Kali Pada Chowdhury v. Union of India* AIR [1963] SC 134. Gajendragadkar J (delivering judgment for himself, Sinha CJ, Wanchoo and Shah JJ) said:

> Whether or not the word 'may' means 'may' or it means ''shall' would inevitably depend upon the context in which the said word occurs ...

[9] Further, it is a salutary guide to construction that:

> When certain requirements are prescribed by a statute as preliminary to the acquisition of a right or benefit conferred by the statute, such prescriptions are mandatory for the acquisition of the right or benefit. See, *GP Singh's Principles of Statutory Interpretation* (9th edn).

[10] Now, apply that here. If the Act was not there, the plaintiff would have had to sue on the award in an action at common law. Or it would have to register the award as a judgment in the Singapore court and then seek to register and enforce that judgment under the Reciprocal Enforcement of Judgments Act 1958. The right to enforce a Convention award pursuant to s. 3(1) of the Act is therefore a benefit that the plaintiff would

not but for the Act have. Hence, the requirement of Gazetting a country as a party to the Convention must have been intended by Parliament to be mandatory in effect.

[11] In the second place, for the reasons already given, once it is determined that s. 2(2) is mandatory in nature, the argument that it is evidential falls to the ground. What subsection 2 does is to require His Majesty to Gazette a country as a party to the Convention and once that is done, no further proof of that fact is necessary. All that one has to do is to produce the Gazette and thereafter no evidence shall be admitted to contradict the contents of the Gazette. That is the effect of the conclusive evidence limb of s. 2(2). See *Re Warren* [1870] 4 SALR 25.

[12] In the third place, while we agree that the modern approach to interpretation of written law is to examine the purpose of the particular statute (see *Pepper v. Hart* [1993] 1 All ER 42, 50 per Lord Griffiths; s. 17A of the Consolidated Interpretation Acts 1948 and 1967) we are unable to see how that is of any assistance to the plaintiff. In our judgment the purpose of the Act is to give effect to the New York Convention subject to certain reservations. One of the steps that Parliament intended that the Executive should take to give the Act efficacy is to issue a Gazette Notification declaring one or more countries as a party or as parties to the Convention. That is the intention to which we are now giving effect. It may be that the Executive has not acted for all these years on grounds of comity and reciprocity. Or perhaps it is an oversight. For we notice that although Malaysia has not issued a Gazette Notification pursuant to s. 2(2), Singapore has in 1985 included Malaysia in its Gazette as a Convention party. In our judgment the time has come for the Attorney General's Chambers to look into this matter.

[13] As a last ditch effort, counsel for the plaintiff said that his client will be left remediless. That, we think, is quite wrong. There is nothing to prevent the plaintiff from having the award registered as a judgment in the Singapore High Court and then to seek registration of that judgment in this country pursuant to the Reciprocal Enforcement of Judgments Act 1958.

[14] For the reasons already given, we allowed the appeal, set aside the judgment of the learned judge and made those orders usually consequent upon success.